



New Motor Vehicle Board

In-Site

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PETITION PROCESS TO CHANGE AT THE NMVB AS A RESULT OF THE RECENT DECISION IN PHILLIPS MAZDA

On September 2, 2003, the decision in *Mazda Motor of America, Inc. v. California New Motor Vehicle Board; David J. Phillips Buick-Pontiac, Inc., Real Party in Interest* (2003) 110 Cal.App.4th 1451, became final. Pursuant to the decision, the Board will no longer hear actions between two licensees when relief is sought under Vehicle Code section 3050, subdivision (c)(2). This change is the direct result of the holding of *Phillips Mazda* which found the Board does not have jurisdiction in these matters.

Historically, the Board and various appellate courts have interpreted subdivision (c)(2) to provide the authority for petition hearings to be conducted by an Administrative Law Judge concerning alleged violations of the Vehicle Code. Subdivision (c)(2) specifically provides that the Board may “undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing **between any member of the public and any new motor vehicle dealer, manufacturer, ... distributor branch...**” (emphasis added)

Before *Phillips Mazda*, a “member of the public” was construed to include new motor vehicle dealers and other licensees as well as individuals. *Phillips Mazda*,

in accord with *Hardin Oldsmobile v. New Motor Vehicle Board* (1997) 52 Cal.App.4th 585; 60 Cal. Rptr. 2d 583, reverses this interpretation, thus limiting the Board’s jurisdiction. Therefore, *Phillips Mazda* limits the Board to resolving disputes solely between a non-licensee individual and a licensee when relief is sought under Vehicle Code section 3050, subdivision (c)(2).

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ACTIVE NMVB CASES

Vehicle Code Section		Active
3060	Termination/Modification	10
3062	Establishment/Relocation	14
3064	Delivery and Preparation	0
3065	Warranty Reimbursement	0
3065.1	Franchisor Incentive	0
TOTAL PROTESTS:		24
3050(c) PETITIONS		3
3050(b) APPEALS		0
TOTAL CASES:		27

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1507 21st Street, Suite 330, Sacramento, CA 95814

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At its September 18, 2003, General meeting the members of the New Motor Vehicle Board met and considered the impact of the *Phillips Mazda* decision on current licensee Petitions before the Board.

As a result, the Board ordered all licensee Petitioners to show cause, on or before Thursday, October 16, 2003, why their petition should not be dismissed. The failure of a Petitioner to show cause on or before this date could result in a dismissal of the action.

The Board also established the following briefing schedule:

1. Petitioners shall have through Thursday, October 16, 2003, to file and serve a brief addressing the effect of *Mazda Motor of America, Inc. v. California New Motor Vehicle Board; David J. Phillips Buick-Pontiac, Inc., Real Party in Interest* and its effect on the New Motor Vehicle Board's retention of jurisdiction over the matter.

2. Respondents shall have through Monday, October 27, 2003, to file and serve a responsive brief, if any is required or desired.

This issue is agendized for the November 7, 2003, Board meeting. In addition, the Board will review new petition procedures that will be utilized in light of the *Phillips Mazda* decision.

FORMER BOARD MEMBER DIES

George Leaver, Board member from 1993 to 1996, passed away on July 18, 2003, in Chico. During his term he served as a catalyst for many improvements in Board policies and procedures.

Mr. Leaver was a retired partner of the law firm of Manning, Leaver, Bruder & Berberich and was a strong advocate for automobile dealers throughout his legal career. He was also a former attorney for the California Motor Car Dealers Association. He is survived by his wife, a son, two daughters and grandchildren.

RESOLUTIONS PRESENTED TO FORMER MEMBERS SOTERAS AND BROGIN

At the September 18, 2003, General Meeting, the Board presented Resolutions to Solon Soteras and Wendy Brogin, former Public members, in appreciation for their dedication and service to the Board. Mr. Stevens presented the Resolutions to Mr. Soteras and Mrs. Brogin on behalf of the members and staff.

IN-SITE



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Members

Robert Branzuela
Robert T. (Tom) Flesh
David C. Lizárraga
Angelo Quaranta
Alan J. Skobin

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Questions or comments: Editor, nmvb@pacbell.net

NEW DOCUMENT RETENTION POLICY RECEIVES FINAL APPROVAL

Robin Parker
Suzanne Takehara

The Board's staff, in an ongoing effort to improve operations, is currently in the midst of purging its files and records of thousands of obsolete documents. This follows the establishment of a Document Retention Policy ("Policy") that the Board adopted at its October 29, 2002, General Meeting.

The Policy was created because the Board found that having retained its records since its inception in 1967 was inefficient and costly, with hundreds of boxes taking up valuable space. The Policy, however, was not adopted until thorough research was conducted regarding an appropriate record retention time period for each category of documents, as well as appropriate destruction and archival methods.

The Policy faced further review and approvals after being adopted by the Board. Before the document purge could begin, approval was needed from both the Director of the Department of General Services, and the Chief of the Archives and Museum Division of the Office of the Secretary of State. The Policy received all necessary approvals and the Board is now acting to ensure all retained records comply with the new Policy.



NEW MOTOR VEHICLE BOARD DOCUMENT RETENTION POLICY

1. The Board's judicial and administrative case files shall be retained in their entirety, including exhibits and transcripts, at the Board's offices for a period of ten years after the case is no longer active.
2. After the ten-year period set forth in paragraph 1, above, all Final Decisions along with all briefs submitted at the close of the administrative record will be separately retained as permanent public records, and stored at the Board's offices. The remainder of each file, i.e., exhibits and transcripts, will then be confidentially destroyed.
3. Records of consumer complaints that are received by the Mediation Services Program will be retained for three years after the case is closed followed by confidential destruction.
4. Administrative records including, but not limited to, budget reports, travel expense claims, purchase agreements, and property survey reports, will be retained in the Board's offices for eight years from the end of the fiscal year in which the document was prepared, followed by confidential destruction. Employee personnel files, which include documents relating to health benefits, payroll deductions, performance appraisals, etc., will be retained for eight years beyond the employee's separation followed by confidential destruction.

SPECIAL BOARD MEETING HIGHLIGHTS

The New Motor Vehicle Board ("Board") held a Special meeting on July 21, 2003, at the Holiday Inn Civic Center, 50 8th Street, San Francisco, California.

1. CONSIDERATION OF PROPOSED DECISION AFTER REMAND

UNIVERSITY FORD, dba BOB BAKER FORD v. FORD MOTOR COMPANY
Petition No. P-450-02

The Public members of the Board deliberated in closed Executive Session. Mr. Lizárraga moved to adopt the Administrative Law Judge's Proposed Decision after Remand. Mr. Quaranta seconded the motion. The motion carried unanimously.

Asbury Automotive owns seven Ford and five Lincoln-Mercury dealerships in various regions of the country, but none in California. In 2002, Asbury and Bob Baker negotiated a transaction for the sale of all six of Bob Baker's dealerships. Of the 10 franchises in the sale, Ford, Toyota, and Lexus had not approved the sale. The other seven manufacturer/distributor's had given their approval.

Ford withheld its consent to the purchase because of Asbury's Ford dealerships 3 ½ year history of poor performance in both sales and customer satisfaction.

The sole issue presented before this Board was whether Ford's withholding of consent to the Asbury-Baker buy-sell transaction was unreasonable.

The effect of the Board's decision is to OVERRULE the Petition, and not require Ford Motor Company to consent to the Asbury-Baker buy-sell. Note: On August 21, 2003, Bob Baker Ford filed a Writ of Mandamus Petition in the Sacramento County Superior Court challenging the Board's decision in light of the *Phillips Mazda* case. (see page 1)

The New Motor Vehicle Board ("Board") held a Special meeting on August 27, 2003, at BMW Group, DesignworksUSA, 2201 Corporate Center Drive, Newbury Park, California.

1. TOUR OF THE BMW GROUP DESIGNWORKSUSA FACILITY - BOARD DEVELOPMENT COMMITTEE

As part of the Board's ongoing member education program, Board members and staff toured the BMW design center in late August. Adrian Van Hooydonk, President of BMW Group DesignWorks, presented a brief history of the design studio, his background, the types of products designed by the company, and answered member's questions. Robert L. Frisch, Vice President, Western Region, BMW of North America, also provided the members with his background and answered questions.

The New Motor Vehicle Board Development Committee was instrumental in organizing this Special Meeting designed to provide the Public members with behind-the-scenes insight into the automobile industry. The Board Development Committee takes its commitment to educate and further the Public Board members' understanding of the industry seriously in order to enhance the Board's ability to effectively serve those that appear before it.

GENERAL BOARD MEETING HIGHLIGHTS - SEPTEMBER 18, 2003

- THE MINUTES FROM THE JUNE 17, 2003, GENERAL MEETING, AND JULY 21, 2003, AND AUGUST 27, 2003, SPECIAL MEETINGS WERE APPROVED.
- PRESENTATIONS OF RESOLUTIONS OF APPRECIATION WERE MADE BY THE BOARD TO SOLON SOTERAS, FORMER PUBLIC MEMBER AND TO WENDY BROGIN, FORMER PUBLIC MEMBER.
- ED COX, PRESIDENT, SUNSET BUS, DISCUSSED ISSUES OF INTEREST TO THE SHUTTLE BUS INDUSTRY.
- THE BOARD CONSIDERED AN ADMINISTRATIVE LAW JUDGE'S PROPOSED DECISION IN CLOSED EXECUTIVE SESSION.

Long Beach Honda v. American Honda Motor Company, Inc.
Protest No. PR-1835-02

Mr. Flesh moved to adopt the Administrative Law Judge's Proposed Decision.
Mr. Quaranta seconded the motion. The motion carried unanimously.

Honda proposed to relocate Harbor City Honda in the Los Angeles metro market to Carson. Long Beach Honda protested the move arguing an additional dealership was not warranted in the area.

The existing location was in what used to be an auto row, from which other lines such as Volkswagen, Porsche, Nissan, Chevrolet, Oldsmobile, and Ford have relocated; in a run-down area subject to gang activity and graffiti; and, housed in a small, old facility on which no dealer has been willing to spend money to expand or remodel. The proposed new location would be located on the 405 freeway, in a better business area and would be housed in a new state-of-the-art facility.

The effect of the Board's action was to OVERRULE the Protest, and allow Honda to relocate Harbor City Honda to Carson, California.

- THE BOARD UNANIMOUSLY SELECTED SUSANNA BADALYAN-DEUS TO RECEIVE ITS EMPLOYEE RECOGNITION AWARD.
- THE BOARD DISCUSSED THE EFFECT OF THE DECISION IN MAZDA MOTOR OF AMERICA, INC. V. CALIFORNIA NEW MOTOR VEHICLE BOARD; PHILLIPS MAZDA, REAL PARTY IN INTEREST (2003 DJDAR 8591) ON THE BOARD'S OPERATIONS. THE BOARD PRESIDENT DIRECTED STAFF TO ISSUE ORDERS TO SHOW CAUSE IN TWO CASES REGARDING WHY THE MATTERS SHOULD NOT BE DISMISSED WITHOUT PREJUDICE IN LIGHT OF THE DECISION.

PENDING COURT CASES



DAUGHERTY LINCOLN MERCURY, INC., v. NEW MOTOR VEHICLE BOARD; FORD MOTOR COMPANY LINCOLN MERCURY DIVISION, Real Party In Interest

Sacramento Co. Sup. Court No. 03CS00861

Hon. Trena H. Burger-Plavan Dept. 26

Attorney for Daugherty Lincoln Mercury, Inc.: Michael Sieving

Attorney for Ford Motor Company: Cranston Williams

Daugherty alleges that the Board abused its discretion in the Decision to overrule Protest No. PR-1798-02. The Board will not participate in this writ proceeding, as there is no significant state interest at issue.

est at issue.

UNIVERSITY FORD, INC., dba BOB BAKER FORD V. NEW MOTOR VEHICLE BOARD; FORD MOTOR COMPANY, Real Party In Interest

Sacramento Co. Sup. Court No. 03CS01227

Hon. Lloyd G. Connelly Dept. 33

Attorney for University Ford, Inc., dba Bob Baker Ford: Michael Sieving

Attorney for Ford Motor Company: Cranston Williams

Baker alleges the Board had no jurisdiction to hear the petition pursuant to the outcome of *Phillips Mazda*, in the alternative, alleges the Board did not "consider or address" various evidentiary matters, and lastly, seeks an independent standard of review of the Board's decision. The Board will not participate in this writ proceeding, as there is no significant state interest at issue.

SCHEDULED HEARINGS

10-24-03 10:00 am

PR-1844-03 Fremont Automobile Dealership, LLP dba Fremont Toyota v. Toyota (5-7 days)

10-28-03 9:00 am

PR-1856-03 Planet Nissan v. Nissan (9 days)

11-3-03 10:00 am

PR-1860-03 University Ford, Inc., dba Bob Baker Ford, v. Ford Motor Company (5 days)

12-1-03 10:00 am

PR-1772-01 Melrose Ford v. Ford (10 days) (12-1 to 12-5) (12-15 to 12-19)

Tentative Hearings:

1-12-04 10:00 am

PR-1863-03 Louis G. Miller, Inc., dba Culver City Nissan v. Nissan North America, Inc. (10 days)

1-26-04 10:00 am

PR-1843-03 R & G Toyota v. Toyota (5 days)

1-26-04 10:00 am

PR-1866-03 Greenwood Hyundai v. Hyundai (9 days)

2-23-04 10:00 am

PR-1869-03 PR-1869-03 Airport Marina Ford v. Ford (consolid.)

PR-1870-03, PR-1871-03, PR-1872-03)

Dates are subject to change and cases may settle prior to hearing

MICHAEL CADILLAC, INC., dba MICHAEL VOLKSWAGEN, Petitioner v. NEW MOTOR VEHICLE BOARD, Respondent; VOLKSWAGEN OF AMERICA, INC., Real Party in Interest

Sacramento Co. Sup. Court No. 03CS01129

Hon. Raymond M. Cadei Dept. 25

Attorney for Michael Cadillac, Inc., dba Michael Volkswagen: Michael Flanagan

Attorney for Volkswagen of America, Inc.: Allen Resnick

Michael Volkswagen alleges the Board's Decision was invalid because the Board committed a prejudicial abuse of its discretion, and did not proceed in a manner required by law. Therefore, the findings do not support the Decision, the findings are not supported by the evidence, and Michael Volkswagen does not have a plain, speedy or adequate remedy under the law. Lastly, Michael Volkswagen seeks an independent standard of review of the Board's June 17, 2003, Decision. The Board will not participate in this writ proceeding, as there is no significant state interest at issue.



MEDIATION SPOTLIGHT

Mediation Services
Representative
Heather Collins

On June 17, 2003, the New Motor Vehicle Board's Mediation Services Program received a request for mediation from a Southern California consumer who was having problems with a 2001 Volkswagen Beetle and wanted the dealership to buy back the vehicle. His case was assigned to Senior Mediation Services Representative Heather Collins.

The vehicle was a factory certified used vehicle and carried the remainder of the factory warranty. Shortly after the consumer purchased the vehicle, he began to experience mechanical problems with it, which included a severe vibration noise on acceleration, failing to start and an inoperable seatbelt. The consumer had the vehicle inspected at a private auto body shop and it was found that the vehicle had frame damage that was thought to be incurred as the result of a rear-end collision.

On June 18, 2003, Ms. Collins sent a letter of inquiry to the dealership. Because the consumer was alleging that the dealership committed fraud by not notifying him that the vehicle had major frame damage, the Department of Motor Vehicles, Investigations Unit was notified and provided with a copy of the consumer's file. On July 10, 2003, Ms. Collins received a letter from the selling dealership stating they would unwind the deal (rescind the contract).

On July 14, 2003, Ms. Collins received a letter from the dealership's attorney which stated that the consumer had not accepted the dealership's offer to unwind the deal. Ms. Collins immediately contacted the consumer to discuss the dealership's offer. It was then that Ms. Collins discovered that the consumer was not familiar with the term "unwind" and mistakenly thought that the vehicle was going to be repossessed.

The consumer was elated when Ms. Collins

explained the unwind process to him. The consumer noted during this conversation that he had to pay for some repairs to the vehicle and he wanted to be reimbursed for them. Ms. Collins relayed this request to the dealership's attorney who said he would discuss the issue with his client.

On July 18, 2003, Ms. Collins received a call from the dealership's attorney. He stated that they would pay off the loan, but would not reimburse the consumer for the three payments that he made. Ms. Collins informed him that since the payments are part of the contract, they should be included in the unwind as agreed upon in their previous conversation on July 14, 2003.

On July 22, 2003, Ms. Collins received a letter from the dealership stating that they would unwind the contract by returning the consumer's down payment, reimburse him for his payments, and pay off the loan. They denied the consumer's request for reimbursement for the repairs to the vehicle.

The consumer agreed to accept the offer. This was relayed to the dealership; however, the General Manager called Ms. Collins later that day to say that he had changed his mind, decided to pay for the repairs, and would issue a check to the consumer. On July 23, 2003, the consumer delivered the vehicle to the dealership and the contract was unwound as promised.

The consumer wrote a glowing thank-you letter to Ms. Collins. In it he relayed that not only was he happy with the outcome, but that upon returning the vehicle, the Vice-President of the dealership applauded Ms. Collins' integrity and professionalism.

MEDIATION STATISTICS

Mediation Phone Calls Received	1,433
Mediation Request Forms Sent to Consumers	368
Cases Filed	154

July 2003 through September 2003

You can reach Mediation Services Staff at
(916) 445-1888

UPCOMING BOARD MEETINGS

General Board Meeting
November 7, 2003
San Francisco



Special Board Meeting
December 11, 2003
Sacramento

Board Meeting dates are subject to change. A meeting agenda with time and location details is mailed 10 days prior to the meeting to all interested parties.

SUSANNA BADALYAN-DEUS RECEIVES EMPLOYEE RECOGNITION AWARD

Ms. Badalyan-Deus was recognized by the Board at its September 17, 2003, General meeting for her excellent performance as a Service Assistant in the Consumer Program of the New Motor Vehicle Board. The Board noted she has exhibited outstanding job performance and customer service in handling extra calls when other staff members are not available. Her highly organized and efficient manner of processing voluminous amounts of letters for the mediation services representatives is greatly appreciated by all. The way in which she thoroughly researches complex issues and assists in administrative matters, is an asset to Mediation Services and Board effectiveness.

In summary, the Board recognized her for her outstanding ability to complete projects in a timely and accurate manner as well as the courteous way she treats consumers calling with complaints. She is also highly organized and efficient and her positive attitude makes working with her a pleasure. Her outstanding performance has contributed greatly to the Board's operations.



Susanna Badalyan-Deus, Service Assistant